FILE COPY

DEC 2
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 75.

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

STANLEY B. HOUCK,
Attorney for Respondent,
910 McKnight Building,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

	Page.
Statement of the case	1
Ultimate question	2
Brief of argument	2
Summary of respondent's argument	2
Measure of damages for loss in transit	3
Market value is measure of just compensation	5
Market value determinable in respect of exact quantity lost	7
General answer to petitioner	9
Inquiry into courts subsequent to delivery or into collateral matters improper	12
True measure of damages	15
Conclusion	18

TABLE OF CASES.

Page.

Allen vs. Adams Express Co., 77 Pa. Super. Ct. 174.... 4

Atlantic Coast Line Ry. Co. vs. Roe (Fla.), 118 So. 155, 156 ..... 4, 16

Brown vs. Chi., M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356, 41 Am Rep. 41..... 11

Chicago, M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. Ed. 801..... 4

Crutchfield & Woolfolg vs. Hines, 239 Mass. 84, 131 N. E. 340 4

Crail vs. Ill. Cent. R. Co., 2 Fed. (2nd) 287; 13 Fed. (2nd) 459; 21 Fed (2nd) 836; 31 Fed. (2nd) 111.....4, 9

Gulf, C. & S. F. Ry. Co. vs. Cleburne I. & F. Co., 37 Tex. Civ. App. 334, 79 S. W. 836..... 16

Hoover & Co. vs. Denver & R. G. W. R. Co., 17 Fed. (2nd) 881, 886 4

Haskell vs. Hunter, 23 Mich. 305, 309..... 10

Heidritter Lbr. Co. vs. Central R. Co., 122 Atl. 691, 125 Atl. 926 16

Ill. Cent. R. Co. vs. Crail, 13 Fed. (2nd) 459.....4, 7

Leominster Fuel Co. vs. New York, N. H. & H. R. Co., 258 Mass. 149, 154 N. E. 831.....4, 16, 17

Muser vs. Magone, 155 U. S. 240, 249..... 5

Moelring vs. Smith, 7 Ind. App. 451, 34 N. E. 675..... 17

Quanah A. & P. Ry. Co. vs. Campbell (Tex. Civ. App.), 170 S. W. 859..... 16

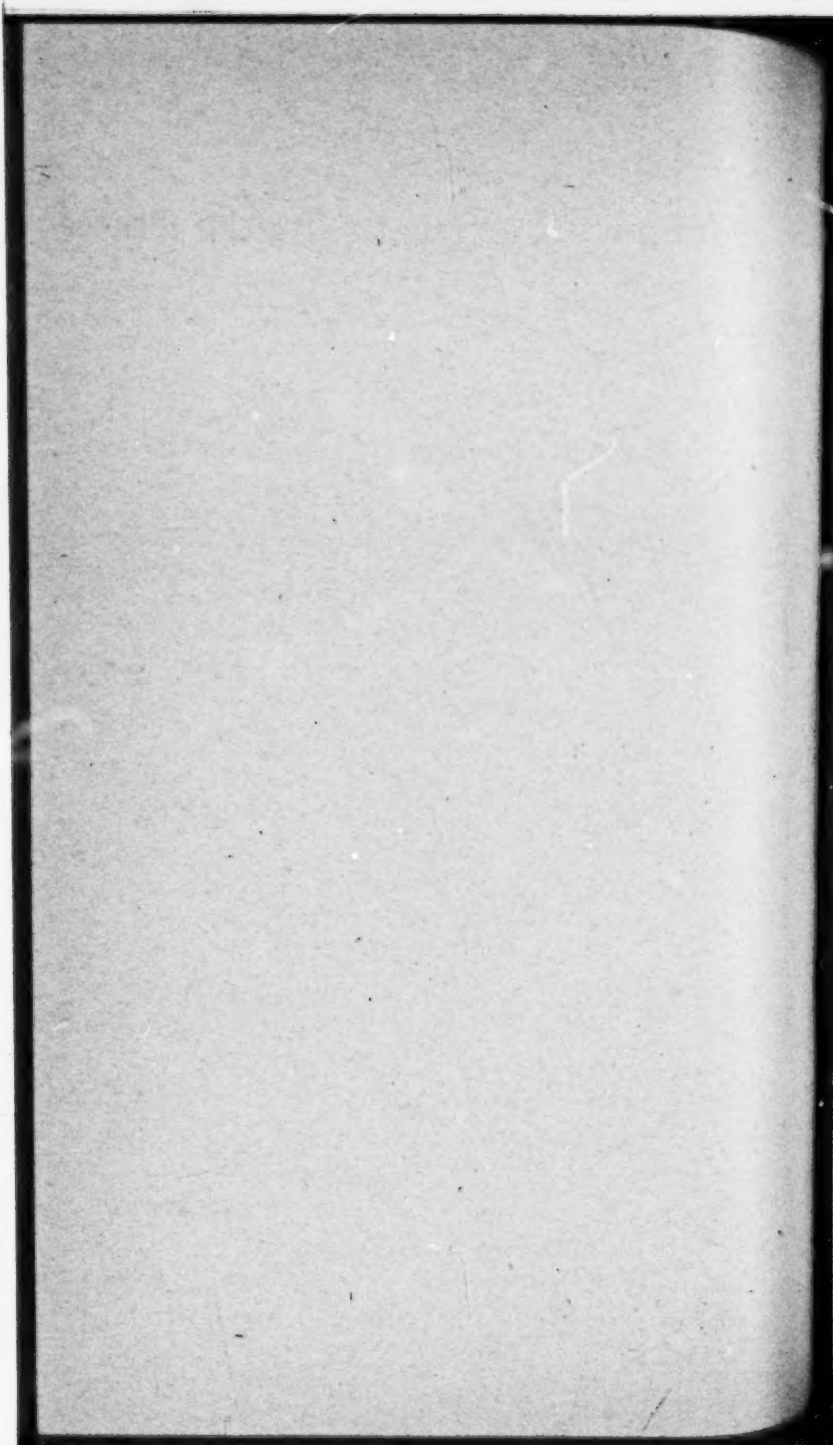
Stanford vs. Peck, 63 Conn. 486, 493..... 5

Stone vs. Codman, 15 Pickering (Mass.) 297, 300..... 13

Southern Pac. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, 534 13

St. L. & S. F. Ry. Co. vs. Watkins, 45 Tex. Civ. App. 321.16, 17

The Rossend Castle, 30 Fed. 462..... 17
The Erroe, 17 Blatchf. (C. C.) 16, Fed. Cas. 4522..... 17
United States vs. New River Collieries Co., 262 U. S. 341;
43 Sup. Ct. 565, 67 L. Ed. 1014.....6, 8, 11
Woonsocket M. & P. Co. vs. New York, N. H. & H. R. Co.,
239 Mass. 211, 131 N. E. 461..... 4
Wendnagel vs. Houston, 155 Ill. App. 664.....8, 10
Waggoner Undertaking Co. vs. Jones (Mo.), 114 S. W.
1049 17
1 Sedgwick on Damages (9th Ed.), Sec. 40, p. 45..... 11
1 Sutherland on Damages (4th Ed.), Sec. 105, p. 367.... 11



Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 75.

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,

Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's statements on pages 5, 6 and 7 of its brief, under the above title are substantially correct. But a large portion of the statement is a summary of section VIII of the stipulation of facts (R. 9, 10), to the materiality and relevancy of which respondent duly objected at the trial (R. 11).

It is respondent's view that the only material and relevant facts are the following:

Petitioner, admits, on page 6 of its brief, that it is liable to respondent for the full actual loss, damage or injury occa-

sioned by loss in transit of 5,500 pounds of coal from an interstate shipment (R. 7, 8).

When the shipment from which the loss occurred arrived at destination, there was at destination a free and ready market, in any quantity, for coal of the kind, size and grade lost (R. 8).

At the time, the fair, reasonable, average market value and price of coal of the kind, size and grade lost in transit from the shipment, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser, in lots of 5,500 pounds was $13.00 per ton, including freight; and such coal in such quantity to be delivered to the purchaser, for consumption or any other use could not at that time have been purchased in that market for less (R. 9).

ULTIMATE QUESTION.

Petitioner, on page 6 of its brief, admits liability to respondent in some amount.

Petitioner correctly states, on page 12 of its brief, that "both parties agree that the market value at destination is the measure of damages."

The sole question, then, is what is the market value at destination of the 5,500 pounds of coal for the loss of which in transit petitioner is liable to respondent?

BRIEF OF ARGUMENT.

May It Please The Court:

SUMMARY OF RESPONDENT'S ARGUMENT.

The true measure of damages for the breach of a contract to transport and deliver coal or other like personal property

at a certain place or time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper or owner to pay in the open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

If the commodity lost be a staple which, like coal, is produced for sale and consumption, not for retention and long use, the only inquiry to be made in reckoning its value is its worth as an article of sale. If it be shown that at the destination, at the time the remainder of the shipment arrived there, there was a market in which like coal in volume was openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its loss.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages.

I.

THE MEASURE OF DAMAGES FOR THE LOSS IN TRANSIT OF A PART OF A SHIPMENT IS THE VALUE OF WHAT HAS BEEN LOST AT THE TIME AND PLACE AT WHICH IT SHOULD HAVE BEEN DELIVERED, WITH INTEREST, LESS THE TRANSPORTATION CHARGES, IF THEY HAVE NOT BEEN PAID.

The foregoing states the common law rule for measuring damages for loss in transit by a common carrier.

The so-called Cummin's Amendment to the Interstate Commerce Act (Act. Cong. March 4, 1915, 38 Stat. L. 1196, as amended by Act. Cong. Aug. 9, 1916, 39 Stat. L. 441 and

Act. Cong. Feb. 28, 1920, 41 Stat. L. 494), has not changed this rule.

Chicago, M. & St. P. Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. Ed. 801.

Leominster Fuel Co. vs. New York, N. H. & H. R. Co., 258 Mass. 149, 154 N. E. 831.

Crutchfield & Woolfolk vs. Hines, 239 Mass. 84, 131 N. E. 340.

Woonsocket M. & P. Co. vs. New York, N. H. & H. R. Co., 239 Mass. 211, 131 N. E. 461.

Hoover & Co. vs. Denver & R. G. W. R. Co., 17 Fed. (2nd) 881, 886.

Allen vs. Adams Express Co., 77 Pa. Super. Ct. 174.

Atlantic Coast Line Ry. Co. vs. Roe (Fla.), 118 So. 155, 156.

Both the District Court and the Circuit Court of Appeals in this case have held that this rule is applicable to this case.

Crail vs. Ill. Cent. R. Co., 2 Fed. (2nd) 287; 13 Fed. (2nd) 459; 21 Fed. (2nd) 836; 31 Fed. (2nd) 111.

Petitioner states, on page 12 of its brief, that "both parties agree that the market value at destination is the measure of damages."

The Circuit Court of Appeals for the Eighth Circuit, to which the writ of certiorari in this case is directed, found that "the true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place or time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed."

Ill. Cent. R. Co. vs. Crail, 13 Fed. (2nd) 459.

II.

IF THE COMMODITY LOST IN TRANSIT BE A STAPLE WHICH, LIKE COAL, IS PRODUCED FOR SALE AND CONSUMPTION, NOT FOR RETENTION AND LONG USE, THE ONLY INQUIRY TO BE MADE IN RECKONING ITS VALUE IS ITS WORTH AS AN ARTICLE OF SALE. IF IT BE SHOWN THAT AT THE DESTINATION, AT THE TIME THE REMAINDER OF THE SHIPMENT ARRIVED THERE, THERE WAS A MARKET IN WHICH LIKE COAL IN VOLUME WAS OPENLY BOUGHT AND SOLD, THE PRICES CURRENT IN SUCH MARKET WILL BE REGARDED AS ITS FAIR MARKET VALUE AND LIKEWISE THE MEASURE OF JUST COMPENSATION FOR ITS LOSS.

Market value has been defined as follows:

"In the matter of Cliquot's Champagne, Judge Hoffman defined the market value of goods to be 'the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade'; and the definition was approved by this court. *Cliquot's Champagne,* 3 Wall. 114, 125, 142."

Muser vs. Magone, 155 U. S. 240, 249.

"The expressions actual value, market value, or market price, when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales public or private in the way of ordinary business. *Century Dictionary; Anderson's Law dictionary; Murray vs. Stanton,* 99 Mass. 348; *Cliquot's Champagne,* 3 Wallace 114."

Stanford vs. Peck, 63 Conn. 486, 493.

More lately, this court said in *United States vs. New River Collieries Co.*, 262 U. S. 341; 43 Sup. Ct. 565, 67 L. Ed. 1014:

> "The facts bring this case within the rule stated by the Circuit Court of Appeals (276 Fed. 690, at p. 692):
>
> 'If it be an article commonly traded in on a market, and it is shown that, at the time and place it was taken, there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.' The lower courts rightly held that market prices prevailing at the times and place of the taking constitute just compensation."

Section V, paragraph (a), of the stipulation of facts (R. 8) states facts which establish the existence of a market at destination within the meaning of the cases cited:

> "At the destination of said shipment, on October 17, 1922, and for some time prior and subsequent thereto, coal of the kind, size and grade contained in said shipment and coal of many other kinds, sizes and grades, had a free and ready market in any quantity, whether less or more than one ton, or by the carload or by a number of carloads. The sales and purchases in said market from day to day were substantial in number and volume."

Respondent does not understand that petitioner denies the existence of a fair market at destination when the remainder of the shipment arrived there.

III.

THE MARKET VALUE AT DESTINATION OF THE QUANTITY OF COAL LOST IN TRANSIT IS THE AMOUNT IT WOULD HAVE BEEN NECESSARY FOR THE SHIPPER OR OWNER TO PAY IN THE OPEN MARKET AT THE TIME AND PLACE OF DELIVERY FOR SUCH A QUANTITY AND KIND OF COAL OR OTHER PROPERTY AS THE CARRIER FAILED TO DELIVER AS IT AGREED.

The foregoing is quoted verbatim from the opinion of the Circuit Court of Appeals in *Ill. Cent. R. Co. vs. Crail,* 13 Fed. (2nd) 459.

Section V, paragraph (d), of the stipulation of facts (R. 9) states facts fully establishing the destination market value of the 5,500 pounds of coal lost in transit:

> "(d) On or about October 17, 1922, at Minneapolis, Minnesota, the fair reasonable, average market value and price of said Southern Illinois Number 2 nut soft coal, when delivered at the expense of the dealer to the purchaser at his place of business or home, for consumption by such purchaser in lots of 5,500 pounds was $13.00 per ton, including freight, and said coal in said quantity to be delivered to said purchaser, for consumption or any other use, could not at said time have been purchased in said market for less."

The above quoted paragraph specifically states that "said coal in said quantity * * * could not at said time have been purchased in said market for less." Paragraph (c) of section V of the stipulation of facts (R. 9) states, with reference to carload values at destination, that "quantities of less than carload lots were not obtainable in said market at said time and place at said price."

It would seem to be unnecessary to urge that if the quan-

tity of the coal, bought and sold affects the prices current in the market, fair market value must be determined by ascertaining the prices current in the market for the purchase or sale of the quantity the value of which is to be determined.

This is the holding of *Wendnagel vs. Houston,* 155 Ill. App. 664, and the quotation appearing therefrom on page 14 of petitioner's brief.

If—and it is specifically so stipulated—5,500 pounds of coal of the kind, size and grade lost from the shipment "could not have been purchased in said market for less than $13.00," it is scarcely open to controversy that the market value thereof is $13.00 per ton and not less.

Certainly if "quantities of less than carload lots were not obtainable in said market at said time and place" (R. 9) for $5.75 per ton, the value of 5,500 pounds of coal was not $5.75 per ton.

The further language of this court in *United States vs. New River Collieries Co., supra,* seems relevant:

> "Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that, if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.
>
> "The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions

were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices."

It is clear, in this case, that respondent, had the 5,500 pounds of coal not been lost in transit, could have obtained $13.00 per ton for it in the destination market.

IV.

General Answer to Petitioner.

Petitioner's position seems to be a dual one; or, at least, in the alternative: *First,* it claims that the value of the 5,500 pounds of lost coal is to be determined by destination value but only *in the car,* and that, so determined a lot of 5,500 pounds has the same value per ton as a lot of a carload would have. *Second,* it asserts that the measure of damages is not the value of what is lost but the difference in value between the larger and smaller cars.

The same may be said of the opinion of the District Judge in *Crail vs. Ill. Cent. R. Co.*, 21 Fed. (2nd) 836.

Most liberally construed, petitioner's argument is in substance a request for a new rule to measure damage for loss in transit. While admitting in its brief that the rule is as heretofore stated in this brief—value at destination of what has been lost in transit (Petitioner's Brief, pp. 18, 21)—it nevertheless flatly contends for an entirely new measure of damages for losses in transit. That new rule is stated on page 18 of petitioner's brief. It is that the "measure of damages is difference between market value of coal delivered in

accordance with contract and market value of the car as it was in fact delivered."

In leading up to this new rule it refers to "value of the coal *in the car*"; to the fact that the "duty of petitioner terminated when it delivered the car of coal; to wholesale and retail prices; to the contemplation of the parties; to collateral matters affecting the conduct of respondent's business; and so forth."

Petitioner cites no case—and respondent is sure there is none— which recognizes its theory that *value in the car,* or the *termination of petitioner's duty with delivery* of the car, in anywise affects or changes liability. Neither claim presents anything new. Both situations have existed during the history of common carriage. None of petitioner's reasoning, based upon them, is convincing that a rule as ancient as common carriage itself has always been wrong and that wrong must now be righted. Neither does petitioner cite cases holding that the value of a small lot is to be determined by ascertaining the deference in value between two larger lots.

Petitioner seems to feel that some strength for its position lies in the application of the adjective *retail* to the $13.00 per ton price in this case. What is in fact a fair, average value or price in a proper market obviously remains so, by whatever adjective it may be described. See, *Wendnagel vs. Houston, supra,* and *Haskell vs. Hunter,* 23 Mich. 305, 309.

There can be no quibble about the statutory liability being for the full, actual, loss, damage or injury. Neither can there be any real doubt that where the property lost has a readily ascertainable market value at the proper time and place, that value is the measure of full, actual loss, dam-

age, or injury. Such is the holding of this court in *United States vs. New River Collieries Co., supra.* In that case also, this court answers petitioner's argument about the justness of a recovery at $13.00 per ton by holding that "the lower courts rightly held that market prices prevailing at the times and place of the taking constitute just compensation."

Moreover, respondent understands that where the law has established a rule for measuring damage for breach of contract, such as loss in transit by a carrier, the parties are conclusively presumed to contemplate a measurement of such a loss by that rule.

1 *Sedgwick on Damages* (9th Ed.), Sec. 40, p. 45.

1 *Sutherland on Damages* (4th Ed.), Sec. 105, p. 367.

Brown vs. Chi., M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41.

There seems to be an intimation near the top of page 15 of petitioner's brief that because the $13.00 market value or price includes delivery at the expense of the dealer that value is inapplicable as a measure of damages in this case. No elaboration of this intimation appears in the brief. It is common knowledge that articles like coal when delivered in small quantities, are delivered by the seller to the purchaser and require for such delivery special facilities such as only a dealer possesses. Read as a whole the paragraph of the stipulation of facts (R. 9) is extremely broad in its terms and covers all sales in quantities of 5,500 pounds in the destination market, both with and without refinements of the sort petitioner suggests. But—even on petitioner's theory—respondent is entitled to have the 5,500 pounds in the car, which requires its delivery there.

There is also an intimation that because no sale was ever made calling for delivery into a car at destination, the $13.00

price is not applicable. If there be merit to this contention, there is no value in the market for a sale to a new home or place of business located between two similar places where, under identically similar conditions, the $13.00 price measures market value.

V.

IN DETERMINING THE VALUE OF THE COMMODITY WHICH HAS BEEN LOST, THE INQUIRY IS LIMITED TO THE TIME WHEN THE SHIPMENT FROM WHICH THE LOSS OCCURRED WAS DELIVERED AT DESTINATION. IT IS IMPROPER TO INQUIRE INTO LATER EVENTS SUCH AS WHETHER PLAINTIFF IN ERROR WAS UNDER ANY NECESSITY OF MAKING REPLACEMENT, OR DID IN FACT REPLACE, OR THAT HE WAS A COAL DEALER, MAKING PURCHASES IN CARLOAD LOTS FROM TIME TO TIME AS HIS NECESSITY REQUIRED, WHICH PURCHASES INCLUDED COAL OF THE KIND AND QUALITY HERE IN QUESTION, OF WHICH ON THE ARRIVAL OF THE CARLOAD FROM WHICH THE LOSS OCCURRED, HE HAD SUFFICIENT FOR HIS NEEDS UNTIL THE ARRIVAL OF THE NEXT CARLOAD OF THE SAME KIND WHICH SHOULD BE PURCHASED, ETC. ETC.

The foregoing principle has been specifically decided by the Supreme Court of Massachusetts, which used the following language:

> "The property is to be estimated in the same manner as it would be, if a jury could have been called on the spot, at the moment the damage was discovered, to estimate it. They would consider the market value on the day. * * * The drawback afterwards allowed by the Government * * * was a casual and accidental advantage, accruing afterwards, and originating in a measure which took place after the facts fixing the plaintiff's

claim to damages had all occurred."

Stone vs. Codman, 15 Pickering (Mass.) 297, 300.

This court has considered the said subject and said:

"The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds vs. Mapes-Reeve Construction Co.*, 177 Massachusetts 41, 44."

Southern Pac. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, 534.

Much of petitioner's argument is based upon portions of the stipulation of facts to the materiality and relevancy of which respondent duly objected at the trial (R. 11). This objection covered the following portions of the stipulation of facts:

"That portion of section V, subdivision (a) which reads: 'Purchases of carload lots, containing 60,000 pounds or more, in said market are termed wholesale purchases and purchases of less than carload lots are termed retail purchases' (R. 8).

That portion of section V, subdivision (d) which reads: 'At and prior to the time of delivery of said shipment less than carload lots of coal had not been sold in said market and delivered to or into any car on track as aforesaid' (R. 9).

All of section VIII of said stipulation; and each separate fact stated in said section VIII considered sepa-

rate and distinct from each other fact therein stated" (R. 9, 10).

Section VIII contains the following statements (R. 9, 10):

"The coal contained in said shipment had not been sold by plaintiff nor had its sale been contracted for prior to the arrival of said shipment, nor was it sold or contracted for sale on October 17, 1922, but the coal contained in said car, PMCK&Y No. 91352, was added to the general stock of coal of the plaintiff at Minneapolis, aforesaid, and had this 5,500 pounds of coal been contained in this car it would have been added to the general stock of coal of the plaintiff at Minneapolis, aforesaid. Plaintiff lost no sale of coal because the said car of coal contained only 83,200 pounds of coal. Plaintiff did not at any time purchase any coal for the purpose of replacing any coal lost from this shipment, except the purchase in carload lots to maintain his stock of said Southern Illinois No. 2 nut soft coal of that kind, size and grade, in carload lots at $5.50 per ton f. o. b. mine in the regular and customary course of his business; and plaintiff and other fuel dealers at said time ordinarily purchased coal exclusively in carload lots f. o. b. mine. That had this car of coal when shipped from the mine contained only 83,200 pounds of coal, the plaintiff would have purchased it. That on and after said October 17, 1922, plaintiff had on hand coal of the kind, size and grade in question, in quantities sufficient to meet the demands of his business and the failure to receive the 5,500 pounds of coal aforesaid in no way interfered with the maintaining by the plaintiff of his ordinary and usual stock of coal, nor did he purchase any coal to take its place, except by the purchase of coal in carload lots

of $5.50 per ton f. o. b. mine in the regular and customary course of his business. Defendant's services in the transportation of the coal in this case ended in the delivery of the car containing the coal upon the said industry track. The unloading of the coal and the further handling of the same for sale or delivery in less than carload lots was at the expense of the plaintiff."

The only material and relevant inquiry in this case is the market value at destination, at the time the remainder of the shipment reached destination, of the 5,500 pounds of coal lost in transit from the shipment. The foregoing facts to which respondent objected are, upon the authority of the cases above cited, immaterial and irrelevant because neither any nor all of said facts tend to prove what was the value of the missing 5,500 pounds of coal.

Similarly, petitioners' argument based upon those facts, is without bearing upon that same issue—the value of the missing 5,500 pounds of coal.

VI.

True Measure of Damages.

Summarizing its argument, respondent urges that the Circuit Court of Appeals for the Eighth Circuit, to which the writ of certiorari in this case is directed, correctly held (13 Fed. (2nd) 459), that the true measure of damages for the breach of a contract to transport and deliver coal or other like personal property at a certain place and time is the fair average market value at the time and place of delivery of such a quantity of like coal or other property as the contractor failed to deliver as agreed. It is the amount it would have been necessary for the shipper or owner to pay in the

open market at the time and place of delivery for such a quantity and kind of coal or other property as the carrier failed to deliver as it agreed.

Heidritter Lbr. Co. vs. Central R. Co., 122 Atl. 691, 125 Atl. 926.

Leominster Fuel Co. vs. New York, N. H. & H. R. Co. (Mass.), 154 N. E. 831.

Gulf, C. & S. F. Ry. Co. vs. Cleburne I. & F. Co., 37 Tex. Civ. App. 334, 79 S. W. 836.

Quanah A. & P. Ry. Co. vs. Campbell (Tex. Civ. App.), 170 S. W. 859.

St. L. & S. F. Ry. Co. vs. Watkins, 45 Tex. Civ. App. 321.

Atlantic Coast Line Ry. Co. vs. Roe (Fla.), 118 So. 155.

"At the destination the only market value of coal in the quantity lost by the carrier was that established by the retail trade. There was no wholesale market where the plaintiff could procure that quantity. The plaintiff was under no obligation to buy another carload of coal at the mine in order to reduce the damage. The plaintiff had not been deprived of a carload but of a much less quantity. The plaintiff could have sold the coal lost by the defendant at $14 per ton in the ordinary course of its retail trade, and coal of that quantity could have been procured delivered at its yard only by payment of that price. That is the amount which it would have been obliged to pay in the open market, at the time and place when the defendant ought to have delivered this coal, for such quantity and quality of coal as the defendant failed to deliver to the plaintiff according to its contract. It is a mere coincidence that this market value happens to involve some element of profit arising in retail business. Such element is recoverable as a separate damage.

Crutchfield & Woolfolk vs. Director General of Railroads, 239 Mass. 84, 89. But that does not prevent recovery by the plaintiff of the full actual damage sustained by it."

Leominster Fuel Co. vs. New York, N. H. & H. R. Co. (Mass.), 154 N. E. 831.

"The testimony as to market value of the goods was not restricted to their price at retail. The testimony showed that the stoves could not be had at Llano, that the only place where they could be gotten was in St. Louis, that the supply in Llano was not equal to the demand for such goods at the time, and that if such goods had not been damaged their actual market value at Llano at the time they were delivered would have been in the aggregate the sum of $438, and that at that time they could have been sold for that amount. Their market value in bulk, under the circumstances, might have been equal to the amount they would have brought at retail prices in the aggregate."

St. Louis & S. F. Co. v. Watkins, 45 Tex. Civ. App. 321.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages.

The Rossend Castle, 30 Fed. 462.

The Erroe, 17 Blatchf. (C. C.) 16, Fed. Cas. 4522.

Moelring vs. Smith, 7 Ind. App. 451, 34 N. E. 675.

Waggoner Undertaking Co. vs. Jones (Mo.), 114 S. W. 1049.

VII.

CONCLUSION.

It is respectfully urged by respondent that the decision of the lower court was correct in every particular and should be affirmed.

Dated at Minneapolis, Minnesota, November 30, 1929.

Respectfully submitted,

G. I. CRAIL,

Doing Business as P. McCoy Fuel Co., Respondent.

BY STANLEY B. HOUCK,

Attorney for Respondent,

910 McKnight Building,

Minneapolis, Minnesota.